IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

Opinions Below

The opinion of the Supreme Court of Ohio is reported at 34 Ohio St. 2d 143 and at 296 N.E.2d 683. It is set forth in the Appendix to the petition for a writ of certiorari (which is attached to the printed petition) at pp. 1a-16a.* The Journal Entry of the Court of Appeals for Cuyahoga County, Ohio, is set forth in the appendix at pp. 19a-21a. The Journal Entry of the trial court is set forth in the appendix at pp. 22a-23a.

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* References in this brief to the Appendix attached to the petition for a writ of certiorari will hereafter be cited as "__a". References to the separate Appendix will be designated as "__A".

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on May 23, 1973. The petition for a writ of certiorari was filed on August 21, 1973, and it was granted on November 12, 1973. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to Title 28, United States Code §1257(3).

Question Presented

Whether the First and Fourteenth Amendments prevent a municipality from refusing to sell political advertising for display upon transit vehicles it owns and operates when it has opened a forum by accepting and displaying all other forms of paid commercial and non-commercial advertising.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, Section 1:

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner, plaintiff below,[1] a resident of Shaker Heights, Ohio, was, in mid-1970, a candidate for the office of State Representative to the Ohio General Assembly for the 56th District.[2] As one of the means of promoting his candidacy he sought to purchase advertising space on the Shaker Heights Rapid Transit because "the vast majority of its six to eight thousand riders each day are residents of the district . . . ." Appendix at 14A.

He attempted to purchase the advertising space for the three months prior to the election,[3] by contacting an em-

[1] Hereinafter the parties will be referred to according to their designation in the trial court.

[2] Petitioner was elected to the Ohio House of Representatives and next faces election in 1974. He therefore still has a valid interest in seeking the right to purchase political advertising on the Shaker Heights Transit System. *See, e.g., Jeanette Rankin Brigade* v. *Chief of the Capitol Police*, 421 F.2d 1090, 1092-93 (D.C. Cir. 1969), *on remand*, 342 F. Supp. 575, 579-81 (D.D.C. 1972), *aff'd*, 409 U.S. 972 (1972). As a result, this controversy is not moot in any legal sense. On the contrary, he has a live and continuing stake in the outcome despite the passage of the particular election since it is necessary to settle a practice which is still in force. *Compare Dunn* v. *Blumstein*, 405 U.S. 330, and esp. 333 n. 2 (1972), *with Hall* v. *Beals*, 396 U.S. 45 (1969). Indeed, even voluntary termination of the policy would not create a moot controversy here. *See, e.g., Carroll* v. *Princess Anne*, 393 U.S. 175 (1968); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966).

[3] Appendix at 14A.

ployee of Metro Transit Division of defendant Metromedia, Inc., the exclusive advertising agent for the Shaker Heights Transit System.[4] The employee instructed plaintiff to present the proposed art work to Metromedia for approval as required by Metromedia's "Metro Transit Advertising Copy Policy." Appendix at 16A. Pursuant to the guidelines set forth in the policy, plaintiff's advertising agency submitted the copy for approval. The complete text of the proposed poster read as follows:

> "Harry J. Lehman Is Old Fashioned
> "About Honesty, Integrity, And Good Government
> "State Representative, District 56"

Appendix at 39A. After reviewing the copy, Metromedia's local sales manager, Mr. Hibbs, initialed it to signify that the advertisement met the standards set by the company.[5] Appendix at 16A-17A, 27A.

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[4] Appendix at 24A. The system is city owned and operated and, therefore, its actions, performed under state authority, constitute state action within the meaning of the Fourteenth Amendment. It is too late in the history of the First Amendment to even suggest that the amendment does not apply to actions of a municipality. *E.g., Staub* v. *City of Baxley*, 355 U.S. 313, 321 (1958); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938); *see, e.g., Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925).

[5] The proposed advertisement, identified at 16A and received into evidence at 28A, was photo-reduced for inclusion in the appendix and appears at page 39A. The "Metro Transit Advertising Copy Policy" was included by Justice Stern in his dissent to the opinion of the Supreme Court of Ohio and is reproduced in the appendix to the petition for a writ of certiorari at 13a n. 4. The standards set by the company for political advertising may be found at paragraph "(2)" of the "Copy Policy". *Id.* The policy states that "Metromedia Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair."

Thereafter, the employee, who admitted that the requested space was available,[6] refused to lease the plaintiff any of the twenty (20) advertising spaces available within each of the transit system's fifty-five (55) cars. Appendix at 15A.

The employee refused to rent plaintiff the space required because of Metromedia's contract with the City of Shaker Heights which forbids Metromedia from placing "political advertising in or upon any of said cars" owned by the transit system.[7] Although Metromedia's contract with Shaker Heights prevents it from accepting "political advertisements," [8] it is free to and does accept advertisements for cigarettes, liquor, banks, savings and loans, and retail goods and services. In addition to these commercial advertisements, defendants also accept civic, charitable and public service advertisements from churches and other institutions like the Girl Scouts, Boy Scouts, Peace Corps and the Police Athletic League. Appendix at 25A-26A.

The city has stated that the reasons for its policy of not accepting paid political advertisements are: the administrative problem of providing equal space;[9] the "chances for

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[6] Appendix 14A, 25A.

[7] The applicable parts of the contract appear in the appendix to the petition for a writ of certiorari at 24a-25a. It was introduced and admitted into evidence as a joint exhibit at pages 15-16 of the transcript.

[8] In this case, the city admits that the prohibition against political advertising was placed in the contract at its insistence. Appendix at 32A. In any event, even if the policy had been instituted by Metromedia, it would still be sufficient state action to maintain this inquiry. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438, 441 (S.D.N.Y. 1967).

[9] See Plaintiff's Exhibit 2.

abuse"; and the possibility of "discrimination" or "favoritism." [10]

After attempting to get the city to change its policy without success, plaintiff filed a complaint with the Court of Common Pleas for Cuyahoga County, Ohio, seeking an injunction and a declaratory judgment declaring defendants' policy to be a violation of his constitutional rights under the First and Fourteenth Amendments to the United State Constitution and under the Ohio Constitution. The trial court denied the request for the declaratory judgment and for a permanent injunction. The Eighth District Court of Appeals and, thereafter, the Supreme Court of Ohio, in a four to three decision, affirmed the trial court.

The federal questions tendered herein were presented to the trial court by the complaint and a memorandum of law. The trial court passed on the questions in its journal entry. See appendix to petition for writ of certiorari at 22a-23a. Thereafter, the issues were raised in the Court of Appeals and the Supreme Court of Ohio by plaintiff's statements, briefs and arguments.

The Supreme Court of Ohio passed on the federal questions in its opinion, holding:

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[10] Appendix at 31A. Additionally, the defendants have argued that allowing political advertising would be a violation of their passenger's privacy rights, *see, e.g.*, Brief of Respondents in Opposition (to petition for writ of certiorari) at 10-11, and the Supreme Court of Ohio readily accepted this argument. Appendix to petition for a writ of certiorari at 5a. However, it seems that this rationale is the invention of counsel rather than a matter of record. The sole testimony as to the reasons for the policy was given by the Mayor of Shaker Heights, Paul K. Jones, and he stated only the reasons given in the text accompanying this footnote.

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements, urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution. . . .

Appendix to petition for a writ of certiorari at 1a.

Justice Stern, joined by Chief Justice O'Neill and Justice W. Brown, dissented from the majority opinion in all respects. Appendix to petition for a writ of certiorari at 7a-16a.

The Ohio Supreme Court's Opinion

The Ohio Supreme Court, relying on this Court's decision in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), ruled that commercial advertising is not within the ambit of the First Amendment's protection. Having determined that commercial advertising was not protected speech, the court concluded that the establishment of a commercial advertisement program on these rapid transit vehicles did not open a forum for free speech. Based on this theory, the court held "that a local government may regulate the type of commercial advertising it accepts, and that it is within the authority of that local government to accept only commercial advertising. . . ." Appendix to petition for a writ of certiorari at 7a.

Summary of Argument

In this case the Supreme Court of Ohio reversed traditional First Amendment values and placed a premium on commercial speech over political speech. This result is particularly obnoxious in a democracy because political advertising is at the center of the First Amendment. Most of all, the First Amendment protects speech concerning public affairs and prevents the state from interfering with public discussions of public questions. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964).

Moreover, in arriving at its decision, the court below elected to disregard established principles of law that have been developed to prevent the kind of selective exclusion from a public forum that occurred in this case. There are a wealth of cases, some directly in point, that should have governed the ruling below. In particular, this case should have been controlled by *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 (1972), and the decisions which support it, and *Wirta* v. *Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). In the *Mosley* case this Court applied the "public forum" doctrine in ruling that an ordinance which allowed labor picketing near schools but prohibited all other types of picketing was unconstitutional under both the First and Fourteenth Amendments. In *Wirta,* the California Supreme Court applied the public forum doctrine to a case which is almost identical to this one. There, a group of persons wished to place an anti-war advertisement on transit vehicles that allowed only commercial advertising. The court ruled, consistent with the public forum doctrine, that by having dedicated its buses for use

by advertisers, the system could not exclude from the forum views that it could not countenance.

Nor did the court below examine the reasons which the city relied upon to support its exclusionary policy. Had it done so, as the dissent did, it would have discovered that the excuses for the policy were insufficient to justify a policy which attacks an activity of "governing importance."

ARGUMENT

Introduction

At the outset, it is helpful to understand this case in its relation to the nature of the First Amendment. While theory will not furnish a mechanical basis for this Court's decision, it will provide a reasoned appraisal of whether the restriction on political advertising is compatible with the First Amendment.

Although a number of theories[11] have been advanced to explain the "central meaning of the First Amendment," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273 (1964), this Court has increasingly in recent years pronounced the purpose of the amendment in terms of what has become known as the "self-government" theory.[12] The theory, which

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[11] For short, accurate synopses of the relevant theories now in vogue, *see* DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 188-203 (1972), and Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-86 (1963).

[12] The historically most important of the theories on the meaning of the First Amendment is the "market place theory". This theory suggests that the core value of the amendment is in protecting the search for truth, *i.e.*, truth will be discovered when ideas are free to compete for acceptance in the market place. *See, e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

came to the fore in this Court's decision in *New York Times Co.* v. *Sullivan*,[13] is based on the view that speech concerning public affairs is the essence of self-government.[14] *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). The First Amendment assures the American people of the right to obtain the necessary knowledge to govern themselves, *see, e.g., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-89 (1967); *Cox* v. *Louisiana*, 379 U.S. 536, 552 (1965), and "the right of individuals . . . to attempt to persuade others to their points of view." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (hereinafter cited as *CBS*). Authoritative interpretations of the First Amendment have consistently recognized "that debate on public issues should be uninhibited, robust and wide-open," 376 U.S. at 270, if we are to maintain a government that is responsive to the will of the people. *Stromberg* v. *California*, 283 U.S. 359, 369 (1931). The self-government

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[13] For an excellent critique of the *Times* case and its effect on First Amendment theory, see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

[14] The self-government theory has not replaced the market place theory as an analytical tool in construing the First Amendment. Rather, the two theories are now generally used in tandem. *See, e.g., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). Nor would have Professor Meiklejohn, the leading advocate of the self-government theory, objected to the joinder of the two theories for he too saw self-government best preserved through competition of ideas in the market place. Meiklejohn, POLITICAL FREEDOM 73 (1960).

Although the self-government theory arose to prominence with the *Times* case, the thesis did appear every now and then in some of this Court's pre-Meiklejohn opinions. DuVal, *Free Communication of Ideas, supra* note 11, at 194 n. 138.

theory is based on the thesis that the First Amendment protects these principles.

The First Amendment, then, is the repository of the power of self-government and, because of the amendment, the governors may not infringe on any discussion or debate on public issues held by those governed.[15] The First Amendment is an absolute when the speech is concerned with the spreading of information and opinion necessary for citizens to make electoral decisions. While this Court has held that some kinds of speech and writings, such as "obscenity" and "fighting words" are not expression within the protection of the First Amendment, the *Times* case stands firmly for the proposition that "freedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion." 376 U.S. at 296-97 (Black, J., concurring). Particularly within the unqualified protection of the amendment are the "vast range of forms of thought and expression by which the voter might equip himself to exercise a proper judgment in casting his ballot." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 13 (1965).[16] The state is powerless to abridge the freedom of

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[15] The *New York Times* Court emphasized the importance of the First Amendment in helping to maintain a government of the governed. 376 U.S. at 269. It is precisely because of this vital interest to be protected by the First Amendment that this Court has elevated the freedoms of speech and press to a "preferred position." *E.g., Saia* v. *New York,* 334 U.S. 558, 562 (1948); *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

[16] The placards here are absolutely within the protection of the First Amendment since they are an accepted technique of seeking popular support. *Cf., Martin* v. *City of Struthers,* 319 U.S. 141, 146 (1943). Also, the fact that the message is proposed as a paid advertisement does not make a constitutional difference. *New York Times Co.* v. *Sullivan, supra.*

electoral power of the people. Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245, 254. *See generally* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment, supra;* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L. REV. 877 (1963).

Thus, the action of defendants in denying plaintiff the opportunity to lease advertising space for political speech, viewed in light of the central meaning of the First Amendment, should not be tolerated. We are dealing here with one of the classic examples of an activity which is of "governing importance." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment, supra* at 13. In this case, by banning political advertising while allowing all other types of commercial and noncommercial advertisements, the city of Shaker Heights is interfering solely with "[p]ublic discussion about the qualifications of a candidate for electoral office." It is undoubtedly the strongest possible case for judicial intervention. *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 300 (1971).

Political advertisements are one of the principle means by which self-governing men equip themselves to perform their electoral function and one, we might reemphasize, which is inherently at the root of the First Amendment. *Business Executives' Move for Vietnam Peace* v. *F.C.C.,* 450 F.2d 642, 659 (D.C. Cir. 1971) (hereinafter cited as *Business Executives*), *rev'd sub nom. Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973). The present advertisement, as political expression on a public issue, clearly qualifies for constitu-

tional protection. *New York Times Co.* v. *Sullivan,* 376 U.S. at 271. "It is the right of the public to receive suitable access to . . . political . . . ideas and experiences which is crucial" in this case and begs for protection. *Red Lion Broadcasting Co., Inc.* v. *F.C.C.,* 395 U.S. at 390 (1969).

As will be shown below, the public-forum doctrine, recently articulated by the Court in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972),[17] prevents the perverse type of discrimination practiced by the city owned and operated transit system against expressions of governing importance.

By Dedicating Its Transit System's Vehicles for Use as a Forum for Commercial and Public Service Advertisements, the City Opened a Forum for All Speech and It Cannot Close the Forum to Ideas With Which It Does Not Wish to Contend.

The majority of the Ohio Supreme Court erred because it failed to comprehend that the public forum right is a guarantee of *nondiscriminatory*[18] access to publicly owned

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[17] Hereinafter cited as *Mosley.*

[18] The protection against nondiscriminatory access is supported by two separate, but closely intertwined amendments to the Constitution. *See, e.g., Police Department of the City of Chicago* v. *Mosley,* 408 U.S. at 95-96. Whether embodied within the Fourteenth Amendment's equal protection clause or the equal protection principles developing within the First Amendment, *see* 408 U.S. at 95 and n. 3; *Williams* v. *Rhodes,* 393 U.S. 23, 30-31 (1968); Blasi, *Prior Restraints on Demonstrations,* 68 MICH. L. REV. 1481, 1492 n. 41 (1970), the guarantee of nondiscriminatory access prevents the state from picking and choosing among different views on the basis of the views expressed. Furthermore, whether the guarantee is supported by the First or Fourteenth Amendment is academic to a determination of this appeal since, in either case, the crucial question is whether there is a substantial government justi-

or controlled areas of communication, regardless of the primary purpose for which the area is dedicated. *E.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 557-58 (1965) and 578-81 (Black, J., concurring in part); *Marsh* v. *Alabama*, 326 U.S. 501, 505 n. 2 (1946). Indeed, the error was compounded because we were dealing with a forum that showered its favoritism on all advertisements except those that expressed political ideas. Such favoritism flies in the face of the First Amendment, whose central purpose, as we have seen, is to protect the ability of individuals to gain the knowledge necessary to govern themselves.

The evolution of the concept that the state cannot selectively exclude speakers from an area of communication or, as it is now called, a public forum, began with the cases of *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938), and *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).[19] *See generally* Gardner, *Free Speech in Public Places*, 36 B.U.L. Rev. 239, 241-48 (1956); Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L. J. 931, 932-37.

The former case involved the conviction, which this Court overturned, of a defendant for distributing religious tracts

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fication for the city's discrimination among types of advertising, 408 U.S. at 98-99, and the rational classification argument is not germane. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Business Executives*, 450 F.2d at 660; *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 59-60, 434 P.2d 982, 988, 64 Cal. Rptr. 430, 436 (1967).

[19] *Hague* implicitly overruled *Davis* v. *Massachusetts*, 167 U.S. 43 (1897), a case that denied the existence of any public forum. *See Jamison* v. *Texas*, 318 U.S. 413, 415-16 (1943).

in the streets of Griffin, Georgia without having first obtained written permission from the city manager as required by a city ordinance. In the latter case, this Court affirmed an injunction granted against the mayor of Jersey City who attempted to limit the activities of union organizers by denying them permits to use public parks and streets for speeches and leaflet distribution.

The legal principles derived from these two cases and their progeny[20] are clear:

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

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[20] *E.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Carlson* v. *California*, 310 U.S. 106 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Schneider* v. *State*, 308 U.S. 147 (1939).

Mosley, 408 U.S. at 96 (footnote omitted). *See generally* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

Furthermore, the Court's recent refusal in *CBS* to apply the public forum doctrine to the broadcasting industry does not affect the principles recognized in *Mosley*. Rather, *CBS* demonstrates the public forum doctrine's continued viability and evidences the Court's willingness to apply it in appropriate cases. Mr. Chief Justice Burger, writing for the majority, noted with approval the "decisions holding that state-supported school newspapers and public transit companies were prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements,"[21] but

[21] It should be noted in this regard that the Court cites the cases that have applied the public forum doctrine to public transit companies in circumstances quite similar to those presented by this case. 412 U.S. at 129 n. 23. The transit company cases cited are: *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d 63, 455 P.2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). *Kissinger* is closely analogous to the case at bar, while both *Wirta* and *Hillside Community Church, Inc.* applied the public forum doctrine to fact patterns almost identical to those here.

For similar cases involving speech in public forums, *see, e.g.*, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bazaar* v. *Fortune*, 476 F.2d 570, *aff'd on rehearing en banc*, No. 72-2175 (5th Cir. December 6, 1973); *Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1967), *cert. denied*, 393 U.S. 940 (1969); *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Trujillo* v. *Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Radical Lawyers Caucus* v. *Pool*, 324 F. Supp. 268 (W.D. Tex. 1970); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946); *People* v. *St. Clair*, 56 Misc.2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968).

determined that, because of the unique circumstances inherent within the broadcasting industry, those cases were not applicable to the issues before the Court. It seems patent that had the Court not found these unique circumstances within the broadcasting industry and a lack of state action, the majority would have applied the public forum doctrine. It is submitted that the only difference in the position of the majority and the dissenters is at the threshold question of whether the doctrine applies to the particular facts in *CBS* and not whether the doctrine still exists or even whether the First Amendment prohibits the exclusion of editorial advertisements in favor of commercial advertisements. 412 U.S. at 128-30.

This is not to say, however, that the state cannot preserve the utility of the forum to the service for which it has been dedicated through the use of reasonable "time, place and manner" regulations. *CBS*, 412 U.S. at 200 (Brennan, J., dissenting); *Hague* v. *C.I.O.*, 307 U.S. at 515-16.[22] Yet, although there may be legitimate governmental reasons for having regulations,[23] the state cannot in the guise of regulation discriminate among particular speech on the basis of its content,[24] its controversiality,[25] or even its intensity.[26]

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[22] Where the content of expression is legal, the states' only interest is in regulations designed to protect public safety and welfare. Even then, the regulations must be narrowly drawn to insure no discrimination against speech. *E.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); and cases cited at note 20 *supra*. The kinds and extent of permissible regulations are dictated by the nature of the public place where the speech occurs and the pattern of its normal activities, 408 U.S. at 116; *see Healy* v. *James*, 408 U.S. 169 (1972); *Adderley* v. *Florida*, 385 U.S. 39 (1967).

[23] *See Adderley* v. *Florida*, *supra*.

[24] *E.g.*, *Mosley*, 408 U.S. at 95.

[25] *See, e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

[26] *See, e.g.*, *Saia* v. *New York*, 334 U.S. 558 (1948).

Neither is it meant to suggest that every state facility must be opened for speech. Understandably, the law is that there is no right to a forum unless a forum has been declared to exist. Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273, 274 (1966). *Compare Edwards* v. *South Carolina*, 372 U.S. 229 (1963), *and Brown* v. *Louisiana*, 383 U.S. 131 (1966), *with Adderley* v. *Florida*, 385 U.S. 39 (1967). But, once substantial segments of the public are granted access to an area for purposes of speaking, the public forum doctrine comes into play.

Thus in *Brown* v. *Louisiana*, a silent, orderly protest was allowed within a public library because it did not interfere with the library's function and the protesters' use of the forum was consistent with the purpose for which it had been dedicated. On the other hand, this Court, in *Adderley* v. *Florida*, ruled that the public could be barred from demonstrating on the property of a jail because the activity was interfering with the primary function of the prison.

It is for these reasons that the type of advertising that the Shaker Heights system now allows is of no importance to the controversy over whether or not there is a forum open for speech.[27] The question is not whether the transit system allows First Amendment speech but whether it has determined that transit advertising is inconsistent with its primary role. *E.g.*, *Mosley*, 408 U.S. at 116; *In re Hoffman*,

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[27] Defendants insist that because this Court has previously ruled in *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), that purely commercial advertising is not protected by the First Amendment, the state could not be considered to have opened a forum for free speech when they have limited their forum to solely non-protected commercial speech. As we have seen, this argument misses the point entirely.

67 Cal.2d 845, 850-51, 434 P.2d 353, 356-57, 64 Cal. Rptr. 97, 100-01 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d 63, 68, 455 P.2d 350, 353 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 54 and n. 2, 434 P.2d 982, 985 and n. 2, 64 Cal. Rptr. 430, 433 and n. 2 (1967) (hereinafter cited as *Wirta*);[28] *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, *supra* at 29; Note, 82 HARV. L. REV. 1379, 1382 (1969). Here, by having opened its transit vehicles to commercial speech, the transit authorities have already made that determination: advertising is not incompatible with the primary function of providing transportation. *Wirta*, 68 Cal. 2d at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

In addition, the argument that defendants can avoid opening a forum by permitting only unprotected commercial speech[29] disregards a long line of decisions that hold

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[28] *Wirta*, which is directly in point, was twice cited with approval in *Mosley*, 408 U.S. at 97 n. 5, 100, and, therefore, when read in conjunction with *Mosley*, would seem to be dispositive. Of course, defendants have attempted throughout the course of this litigation to distinguish *Wirta* from the present cause on the basis that the Alameda-Contra Costa Transit District accepted advertisements from candidates on the ballot at the time of an election. As discussed in the text, the type of advertising accepted is not critical. A forum is opened when any advertising is accepted. Furthermore, *Wirta* is not so easily distinguished since the *Wirta* court refused to rule on such a narrow ground. The California Supreme Court determined that a forum was created by the district's having "provided facilities for advertisements on its buses." 68 Cal.2d at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[29] The major premise in the defendants' argument, that commercial speech is entirely outside of the protective umbrella of the First Amendment, may be false. The status of commercial speech under the Amendment has not been finally resolved. *Cammarcano* v. *United States*, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring); *see Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 93 S.Ct. 2553, 2560 (1973), at 2562 (Burger, C.J., dissenting), and at 2566 and n. 6 (Stewart, J., dissenting).

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that commercial speech can be prohibited even though "free" speech cannot be similarly banned. *Compare Martin* v. *City of Struthers,* 319 U.S. 141 (1943), *and Schneider* v. *State,* 308 U.S. 147 (1939), *with Breard* v. *Alexandria,* 341 U.S. 622 (1951), *and Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Moreover, the argument is ironical because the scheme reverses traditional First Amendment priorities. Under the differential treatment, free speech is hardly "preferred." *CBS,* 412 U.S. at 201 (Brennan, J., dissenting); *Wirta,* 68 Cal.2d at 57, 434 P.2d at 986, 64 Cal. Rptr. 434; *Hillside Community Church, Inc.* v. *City of Tacoma,* 76 Wash.2d 63, 68, 455 P.2d 350, 353 (1969). No wonder the argument, first made by Justice Burke in his dissent to *Wirta,* has been called "dubious," *Note,* 43 NOTRE DAME L. REV. 781, 785 (1968), and universally rejected. *See Business Executives,* 450 F.2d at 661. If allowed to stand, the holding below would be a "disturbing enlargement of the 'commercial speech' doctrine and a serious encroachment on the freedom of [speech and] press guaranteed by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 93 S. Ct. 2553, 2560 (1973) (Burger, C.J., dissenting) (citation omitted).

Furthermore, if the argument is valid, we will have come full circle from *Davis* v. *Massachusetts,* 167 U.S. 43 (1897).[30] The *Davis* Court rejected plaintiff's argument that a forum

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It has been, indeed, suggested that commercial speech is just afforded a lesser First Amendment protection rather than none at all. *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191, 1202 (1965). *See, e.g., L. G. Balfour Co.* v. *F.T.C.,* 442 F.2d 1, 24 (7th Cir. 1971); *Hiett* v. *United States,* 415 F.2d 664, 672 (5th Cir. 1969); Redish, *The First Amendment in The Marketplace: Commercial Speech and Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 431 (1971).

[30] *Davis* was overruled in *Hague* v. *C.I.O.* *See* note 19 *supra.*

had been opened in a park because, the Court reasoned, the right to absolutely exclude all use of the park necessarily includes the authority to determine under what circumstances such use may be availed of, "as the greater power contains the lesser." 167 U.S. at 48.[31] This is, of course, the same argument attempted by defendants in this case.

Having demonstrated that a public forum was established by the city owned transit system when it provided facilities for advertisements on its cars, we can now focus our attention on the question of whether there is a substantial and compelling reason to bar political advertising.[32]

The respondents have stated that the reasons for its policy of not accepting paid political advertisements are: the chance that some might interpret the advertisements as an endorsement of a particular person; the chance for abuse; the possibility of discrimination or favoritism; and the risk of violating their passengers' rights.

In light of the general principles previously discussed, the city's reasons, even if they were true,[33] cannot be sufficient to justify the selective exclusion from the forum. They clearly do not rise to a showing of a clear and present danger as required by *Brandenburg* v. *Ohio,* 395 U.S. 444

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[31] Of course, this argument has been thoroughly discredited. *See, e.g., Jamison* v. *Texas,* 318 U.S. 413, 415-16 (1943).

[32] In this case, as in *Mosley,* the selective exclusion is based on the content of the advertisements. The central problem with Shaker Heights' policy, to paraphrase the Court, is that it describes permissible advertising in terms of its subject matter. Commercial advertising is permitted, but political advertising is prohibited. 'The operative distinction is the message on a . . . sign." 408 U.S. at 95.

[33] The record is bare of any factual support for the City's contentions. In fact, their claims are entirely *ipse dixit.*

(1969) and *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). *See Thomas* v. *Collins*, 323 U.S. at 530; *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash.2d at 68-69, 455 P.2d at 354; *Wirta*, 68 Cal.2d at 62, 434 P.2d at 989, 64 Cal. Rptr. at 437; Note, 43 NOTRE DAME L. REV. 781, 785-86 (1968).

The argument that the advertisement might be taken as an endorsement is baseless. This so-called "evil" can be negated by requiring a disclaimer on the face of the advertisement.[34] Even without such a disclaimer few people today are as naive as defendants would have us believe. Indeed, "[t]he endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." *Wirta*, 68 Cal.2d at 61, 434 P.2d at 989, 64 Cal. Rptr. at 437. Nor is a political advertisement any more attributable to the district than would be a cigarette advertisement.

The justification of the selective policy based on the theory that passengers are a "captive audience" likewise cannot be sustained. It is very doubtful that a political sign could infringe upon a passenger's rights. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). A transit rider is not forced or compelled to read any written advertisement. While a person is limited in his ability not to hear a radio message, he is able to look away from a sign

[34] Paragraph (5) of defendant Metromedia's "Metro Transit Advertising Copy Policy" does, in fact, require a disclaimer. Appendix to petition for a writ of certiorari at 13a n. 4. This kind of a disclaimer was upheld in *Bazaar* v. *Fortune*, No. 72-2175 (5th Cir. December 6, 1973) (*en banc*).

if he pleases. *Cohen* v. *California*, 403 U.S. 15, 21 (1971). The present case certainly does not raise the threat to a passenger's privacy that was raised in *Pollak*. If it does, then the answer is to ban all advertising on the transit vehicle. In a democracy can a political advertisement be considered any more obnoxious than, for example, a deodorant commercial?

Moreover, in considering defendants' claim that the political advertisement will interfere with their passenger's rights, we again note that they have never asserted any ways in which political advertisements, in general, or the advertisement here, in particular, could be offensive.

Besides, the allegation is adequately answered in *Cohen*:

> Of course, the mere presumed presence of unwitting listeners does not serve automatically to justify curtailing all speech capable of giving offense. * * * The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

403 U.S. at 21. This Court also recognized that anyone who wished "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." [25]

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[25] The suggestion that constitutionally protected, political signs "may be banned because some persons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment." *CBS*, 412 U.S. at 194-95 n. 35 (Brennan, J., dissenting). *See also* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1510-15 (1970); Note, *Free Speech and the Hostile Audience*, 22 N.Y.U. L. REV. 489 (1951); Note, *Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949).

The genius of the First Amendment is that it has always defined what the public ought to hear by permitting speakers to say what they wish in spite of an unreceptive audience. To hold otherwise would be to countenance "authoritative selection," *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967), based upon an unconfirmed fear of disruption. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969).

The contention that possible favoritism or abuse would result from accepting political advertisements is simply a pretense. If the city wishes to avoid favoritism, it need only accept political advertisements from all who are willing to pay the applicable rates. The city cannot bootstrap itself on the fear that it will act arbitrarily.

Nor can the selective exclusion be justified on the claim that allowing political advertisements would create some type of administrative problem. While defendants might think that this problem is somewhat vexatious, it cannot be controlling. *Ross* v. *Goshi,* 351 F. Supp. 949, 953-54 (D. Hawaii 1972). In any event, this contention is merely a straw man since no one would deny that the city has the right to enforce reasonable time, place and manner regulations. *Wirta,* 68 Cal.2d at 434 P.2d at 990; 64 Cal. Rptr. at 438. The fact that a public forum exists within the transit vehicles does not preclude regulations aimed at easing the administrative burdens, if any, or at safeguarding the primary purpose of the cars. Gorlick, *Right to a Forum, supra* at 274 n. 7 (1966). Of course, the regulations must be reasonable and applied to *all* advertising copy equally.

Despite the wealth of cases,[36] some directly in point, which have recognized and applied the doctrine that prevents the state from granting the use of a forum to some while denying it to others based solely by reference to content, the Supreme Court of Ohio refused to grant plaintiff any relief. In short, the decision below can only be characterized as a flagrant rejection of constitutional principles developed by this Court over the past thirty-five years and should be reversed.

[36] *E.g., Mosley, supra; Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Wirta, supra; In re Hoffman, supra; Hillside Community Church, Inc.* v. *City of Tacoma, supra; Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wisc. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); and cases cited at note 21 *supra*.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded to the Court of Common Pleas for the entering of appropriate relief.

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